

DEPARTMENT OF STATE REVENUE

04-20160009.LOF

Letter of Findings Number: 04-20160009
Sales Tax
For Tax Years 2012-14

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Retail merchant did not produce documentation and explanation showing that certain sales were exempt. Therefore, those sales were subject to sales tax and the proposed assessments were correct.

ISSUE**I. Sales Tax—Imposition.**

Authority: IC § 6-2.5-1-21; IC § 6-2.5-2-1; IC § 6-2.5-3-7; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-4-27](#).

Taxpayer protests the imposition of sales tax on certain transactions.

STATEMENT OF FACTS

Taxpayer is an Indiana business in the sign manufacturing industry. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted sales tax on some taxable transactions during the tax years 2012, 2013, and 2014. The Department therefore issued proposed assessments for sales tax and interest for those years. Taxpayer protested the imposition of sales tax on some of the transactions determined to be taxable by the Department. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Imposition.**DISCUSSION**

Taxpayer protests the imposition of sales tax on the lease of tangible personal property ("TPP") it leased during the tax years 2012-14. The Department imposed sales tax because it determined that the TPP was leased in taxable transactions and that sales tax had not been collected and remitted on the amounts of the lease payments. Taxpayer protests that the transactions determined by the Department to be subject to sales tax were actually predominantly exempt transactions and that sales tax is only due on ten percent of payments for the leased TPP.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[w]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

Also of relevance is IC § 6-2.5-1-21, which states:

- (a) "Lease" or "rental" means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration and may include future options to purchase or extend. "Lease" or "rental" does not include:
 - (1) a transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments;
 - (2) a transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars (\$100) or one percent (1[percent]) of the total required payments; or
 - (3) providing tangible personal property along with an operator for a fixed or indeterminate period, if:
 - (A) the operator is necessary for the equipment to perform as designed; and
 - (B) the operator does more than maintain, inspect, or set up the tangible personal property.
- (b) "Lease" or "rental" includes agreements covering motor vehicles and trailers in which the amount of consideration may be increased or decreased by reference to the amount realized upon sale or disposition of the property as defined in 26 U.S.C. 7701(h)(1).
- (c) The definition of "lease" or "rental" set forth in this section applies throughout this article, regardless of whether a transaction is characterized as a lease or rental under generally accepted accounting principles, the Internal Revenue Code, the uniform commercial code ([IC 26-1](#)), or other provisions of federal, state, or local law.
- (d) This section applies only to leases or rentals entered into after June 30, 2003, and has no retroactive effect on leases or rentals entered into before July 1, 2003.

Also relevant is [45 IAC 2.2-4-27](#), which states in relevant part:

- (a) In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation [[45 IAC 2.2](#)] only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.
- (b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.
- (c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.
- (d) The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.
 - (1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental or lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.
 - (2) Rental or lease period. For purposes of the imposition of the gross retail tax or use tax on rental or leasing transactions, each period for which a rental is payable shall be considered a complete transaction. In the case of a weekly rate, each week shall be considered a complete transaction. In the case of a continuing lease or contract, with or without a definite expiration date, where rental payments are to be made monthly or on some other periodic basis, each payment period shall be considered a completed transaction.
 - (3) Renting or leasing property with an operator:
 - (A) The renting or leasing of tangible personal property, together with the services of an operator shall be

subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised.

(B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator.

(C) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee.

(4) Supplies furnished with leased property. A person engaged in the business of renting or leasing tangible personal property is considered the consumer of supplies, fuels, and other consumables which are furnished with the property which is rented or leased.

Also, [IC 6-2.5-3-7](#) provides:

(a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

(b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

Also, IC § 6-2.5-8-8 states:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(b) The following are the only persons authorized to issue exemption certificates:

(1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;

(2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and

(3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

(c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.

Finally, IC § 6-2.5-9-3 provides:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

(Emphasis added).

Therefore, when a retail merchant makes a retail sale, including rental and leasing activity, to a customer in Indiana, that sale is subject to Indiana sales tax unless the customer provides an exemption certificate as provided by IC § 6-2.5-2-1, IC § 6-2.5-1-21, and IC § 6-2.5-3-7(b). In the instant case, Taxpayer states that it leased equipment to its customer and that the customer used the equipment in a ninety (90) percent exempt manner. This, Taxpayer argues, means that it was only required to collect sales tax on 90 percent of the leasing activity and that it is only liable for ten (10) percent of the sales tax under IC § 6-2.5-9-3. Taxpayer provided documentation and explanation supporting its position that the leased equipment was used in an exempt manner by the lessee.

The Department does not agree with Taxpayer's position. The documentation and explanation do not establish that the TPP involved in the leasing at issue was used in manufacturing. As provided by IC § 6-2.5-8-8, retail merchants are required to collect sales tax unless they receive exemption certificates from their customers. Exemption certificates exist to relieve retail merchants of the burden of proving that a given transaction is not subject to sales tax. In this case, Taxpayer provided neither the standard ST-105 exemption certificate nor the AD-70 post-transaction exemption certificate in the course of the protest process. Without one of these documents, any retail merchant is liable for uncollected sales tax on a retail transaction of TPP in Indiana, as provided by IC § 6-2.5-2-1 and IC § 6-2.5-9-3. Taxpayer has not met the burden of proving the proposed assessment wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

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